No. 88-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORM MALENG, etc., et al.

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENT'S BRIEF ON THE MERITS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Shall the federal courts continue to have habeas corpus jurisdiction to review the constitutional validity of a prior state court conviction which the state uses to directly enhance and lengthen a current state prison term?

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COUNTERSTATEMENT OF THE CASE

A. Course Of Proceedings.

In 1976, Respondent Mark Edwin Cook ("Mr. Cook") was convicted in King County, Washington, Superior Court of first degree assault (two counts) and aiding a prisoner to escape. J.A. 35. The State then filed a Supplemental Information seeking to enhance Mr. Cook's sentence under Washington's "habitual criminal" statute, Wash. Rev. Code ("RCW") 9.92.090. One of the two prior convictions the State proposed to use to impose habitual criminal status and enhance Mr. Cook's sentence was a 1958 conviction in King County Cause Number 31530 for three counts of robbery. This is the 1958 conviction which is at issue in the present case.

The State had to drop its efforts to impose the habitual criminal enhancement. After Mr. Cook objected to the use of the 1958 conviction (*see* J.A. 30-31), the prosecutor conceded in a sworn affidavit dated November 14, 1977:

> . . . the court file in King County Cause No. 31530 shows that on 4 March 1958 an order was signed appointing the commission of a physician to examine Mark Edwin Cook, the court finding a reasonable doubt existing as to the sanity of the defendant; subsequent court documents indicate that the defendant was in fact examined; however, no documents exist to indicate that the defendant was found competent to stand trial prior to the trial in which he was convicted; that an investigation of the Office of the King County Prosecuting Attorney shows that no order of competency was filed, no transcript of a competency hearing exists and the entries of the clerk of the court do not show that either a hearing to determine competency was held subsequent to March 4,1958 or that a finding of competency was made; that for the above facts and reasons your affiant believes that the 7 May 1958 conviction cannot

> be used for the purposes of proving the allegations in the supplemental information. . .

J.A. 10. Based on this admission that the State could not prove the validity of Mr. Cook's 1958 conviction, the trial court dismissed the Supplemental Information. J.A. 11. Sentence on the 1976 conviction was finally imposed in 1978. J.A. 35.[1]

Mr. Cook was also convicted on felony charges in federal court in 1976. J.A. 7. He was sentenced first on his federal sentence and he is currently serving his federal sentence. J.A. 8. His 1978 state sentence will be served consecutively to the federal sentence. J.A. 8. Washington has filed a detainer with the federal authorities so that the State will immediately take Mr. Cook into Washington custody upon his release from federal custody. J.A. 33.

Even though Mr. Cook was not found to be a habitual criminal, the 1958 conviction—apparently obtained without a finding of competency—has remained on Mr. Cook's record and will be used to enhance his 1978 Washington prison sentence. The specific state sentence enhancements which Mr. Cook will suffer from the 1958 conviction are discussed in § B of this factual statement, below at pp. 4-9. Mr. Cook also has alleged that the 1958 conviction is affecting the length of his federal prison term. J.A. 7.

Because of the continuing effects of the 1958 conviction, Mr. Cook filed a Personal Restraint Petition (state post-conviction petition) in the Washington Court of Appeals in about 1982 or 1983, claiming, *inter alia*, that the 1958 conviction was invalid and therefore could not be used to enhance his current sentence. In 1984, that court denied

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[1] This conviction and sentence is therefore referred to in this Brief as "1978 sentence" or "1978 conviction".

relief, and the Washington Supreme Court denied review on the merits. J.A. 12-14. In so doing, the Washington Supreme Court specifically rejected the State's jurisdictional argument under state law:

> The prosecutor maintains that Mr. Cook is not under restraint as a result of the 1958 conviction because the maximum 20-year term of imprisonment on that conviction has expired. As Mr. Cook points out, however, this position is highly questionable in light of the actual and potential consequences to him of having the conviction on his record. There appears to be sufficient existing "restraint" within the meaning of RAP 16.4(b) to warrant relief if relief is otherwise called for.

J.A. 12-13 (citations omitted).

In 1985, Mr. Cook filed a *pro se* Petition For Writ of Habeas Corpus in the United States District Court for the Western District of Washington. J.A. 3-8. Mr. Cook listed the 1958 conviction as the "conviction under attack" (J.A. 3), but also alleged, as Ground Two for relief: "My Washington State sentence under King County Cause Number 76969 [the 1978 sentence] has been unlawfully enhanced on the information of an invalid 1958 conviction". J.A. 6. Mr. Cook also claimed as grounds for relief that the 1958 conviction itself was unconstitutionally obtained, and that the same 1958 conviction was also affecting his federal sentence. J.A. 6-7. The 1958 conviction was defective, Mr. Cook alleged, because he was convicted while incompetent and without due process on the issue of competency. J.A. 6.

The State answered the petition by claiming that the district court lacked jurisdiction because the 20-year sentence on the 1958 conviction had expired, and that delay within the meaning of Rule 9(a) of the Rules Governing

§ 2254 Proceedings In The United States District Courts should prevent a hearing on the merits. J.A. 15-27. Mr. Cook replied that he was "in custody" on the 1958 conviction at least as it enhanced his 1978 state prison sentence. In response the the Rule 9(a) claim, Mr. Cook pointed out the State's 1977 concession during the "habitual criminal" proceedings that the 1958 conviction was insupportable and argued that exhaustion of State remedies had caused much of the delay since the 1978 sentencing. J.A. 29-32. In reply, the State specifically conceded that Mr. Cook is "in custody" on the 1978 state sentence (J.A. 33), the sentence which Mr. Cook alleged is being enhanced by the 1958 conviction.

The District Court held that Mr. Cook was not "in custody" and dismissed the petition. District Court rulings, attached to Cert. Petition as Appendices B and C. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the 1958 conviction's direct enhancement of Mr. Cook's 1978 Washington prison sentence meant that Mr. Cook was "in custody" sufficiently to allow a challenge to 1958 Washington conviction in habeas proceedings. *Cook . Maleng*, 847 F.2d 616 (9th Cir. 1988) (opinion reproduced as Appendix C to Cert. Petition).

The District Court did not reach the Rule 9(a) laches issue. There was no hearing, nor were any findings or conclusions made on that issue. Consequently, the Court of Appeals likewise did not hear or rule upon that issue. The State's Certiorari Petition requested review only of the "custody" question which was resolved by the Ninth Circuit. Cert. Petition at i; Brief Of Petitioner at i.

B. Enhancement Of The 1978 Sentence By The 1958 Conviction.

The State conceded in the District Court that Mr. Cook is "in custody" on the 1978 sentence. J.A. 33. The state has

also conceded here that Mr. Cook's 1978 sentence is directly affected by his prior convictions: "[U]nder current Washington law, the length of the prison sentence actually served by all felony offenders is directly related to those offenders' prior criminal records." States Brief at 8, n. 8. The State's concession that Mr. Cook's prior convictions will directly affect his state prison term is, we believe, sufficient for the issues here to be decided. However, to the extent that details of the specific enhancements will be useful to the Court or important to the decision in this case, and because the state does not discuss those details (State's Brief at 5, n.5; 8, n.8), they are discussed here.

When Mr. Cook is sent to state prison to serve his 1978 sentence, his actual prison sentence will be set by the indeterminate Sentence Review Board ("Board"). RCW 9.95.040, text attached as Appendix E to the Cert. Petition. When the Board performs this function, it will be required by Washington statutes to base the length of Mr. Cook's prison term directly on the 1958 conviction.

Mr. Cook's 1978 sentence was imposed under Washington's "old" sentencing system. The newer Sentencing Reform Act of 1981 ("SRA"), RCW Chapter 9.994A, which initiated a "presumptive" sentencing scheme based on offense seriousness and prior record, applies directly to felonies committed on or after July 1, 1984. However, State law also mandates that the sentencing standards and ranges of the SRA be applied to pre-SRA felony prison terms. RCW 9.95.009(2), text appearing as Appendix B to Respondent's Brief In Opposition. Mr. Cook's actual prison time will thus be set under a "hybrid" system containing elements of both the old sentencing scheme and the new SRA presumptive system. In setting Mr. Cook's prison time under the hybrid system, the

Board will be required by statute to consider the impact of the 1958 conviction on prison time in two ways.

First, pursuant in *In re Hunter*, 106 Wn.2d 495, 723 P.2d 431 (1986), the Board must consider whether any "old law" mandatory minimum prison terms exist due to the 1958 conviction. This will require application of two statutes to Mr. Cook's case.

One of these statutes is former RCW 9.41.025. Former RCW 9.41.025 requires that a defendant who is convicted of using a firearm in the commission of a felony, and who has no prior felony convictions, serve a mandatory minimum duration of confinement of five years. This statute further mandates that a second offender is to given a 7½ year mandatory term, and that a third offender be given a mandatory 15 years in prison. A copy of former RCW 9.41.025 is attached as Appendix A to Mr. Cook's Brief in Opposition To the Petition in this case.[2] Assuming that the Board applies both Mr. Cook's 1958 and 1965 state convictions under this statute,[3] the 1958 conviction at issue here will double the mandatory minimum and thus directly cause an extra 7½ years of required imprisonment.[4] This is the specific sentence enhancement Mr.

[2] Although former RCW 9.41.025 has been repealed, it still applies to Mr. Cook's case through Washington's criminal penalty "savings" statute, RCW 10.01.040.

[3] The 1976 federal conviction would not serve as a second "previous" conviction because the behavior which led to that conviction was contemporaneous with the 1976 behavior leading to the 1978 state sentence. Convictions for contemporaneous behavior cannot be used to enhance each other. *State* v. *Braithwaite*, 92 Wn.2d 624, 628-629, 600 P.2d 1260, 1262-1263 (1979).

[4] The Board will decide for itself whether the 1958 conviction is a prior felony within the meaning of the statute, and whether there is adequate proof of it. *See In re Bush*, 95 Wn.2d 551, 627 P.2d 953 (1981).

Cook alleges in his petition. J.A. 6.

The other "old law" statute which must be considered, even if former RCW 9.41.025 is not applied, is RCW 9.95.040 (text set out as Appendix E to the Cert. Petition). This statute mandates that when a felony conviction includes a finding that the defendant was armed with a deadly weapon, the Board must set the prison term at no less than five years, and if such a defendant has any prior felony conviction, the "mandatory minimum" term is raised from five to 7½ years. The Board cannot waive this term except by an extraordinary two-thirds vote. RCW 9.95.040. The 1978 sentence does include a deadly weapon finding, so when the Board gives Mr. Cook his prison term on the 1978 sentence, the 1958 conviction could be responsible for raising the mandatory minimum term from five to 7½ years.[5]

Second, the Board must consider the Sentencing Grid of the "new law," the SRA, in setting Mr. Cook's prison term. RCW 9.95.009(2). That Sentencing Grid requires increasing Mr. Cook's presumptive time in custody based directly on the number of prior felony convictions proven. If the SRA presumptive term is longer than any "old law" mandatory minimum term, or if no mandatory minimum applies, the SRA presumptive term will provide a base-

[5] As the State points out, Mr. Cook's other Washington felony conviction could cause the same result, but by the time the term is set the 1958 conviction conceivably could be the only other usable felony conviction, thereby directly causing the additional two-and-one-half-year mandatory prison term. State's Brief at 5, n.5. For example, the Board could find that proof of the 1965 conviction is inadequate, or the 1965 conviction could be vacated in other proceedings. *in re Bush*, *supra*.

line prison term which can be altered only in special circumstances.[6]

The 1958 conviction increases Mr. Cook's presumptive sentence under the SRA on his 1978 sentence by several years. Mr. Cook's 1958 conviction, a prior robbery will increase his total Offender Score by two points. This two point increase will increase Mr. Cook's presumptive prison term by about 4 years.[7]

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[6] Although Mr. Cook was sentenced under the former sentencing law, RCW 9.95.009(2) mandates that the SRA provisions be considered with regard to old-law prisoners and defendants. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *Addleman* v. *Board of Prison Terms and Paroles*, 107 Wn.2d 503, 730 P.2d 1327 (1986). RCW 9.95.009(2) is reproduced in Appendix B to Respondent's Brief In Opposition to The Petition For Writ of Certiorari. *Addleman* holds that, even though the SRA is not technically fully retroactive, the SRA standard range is the presumptive sentence, from which departure is allowed only on adequate written reasons. One such reason is "statutory preclusion," *Addleman*, 107 Wn.2d at 511, 730 P.2d at 1332, which means that mandatory prison terms required by RCW 9.95.040 and 9.41.025 take precedence if they are *longer* than the SRA presumptive term. *See In re Hunter, supra*, 723 P.2d at 432-434.

[7] The Sentencing Grid of the SRA provides Standard Sentencing Ranges based on the seriousness level of the current offense cross-referenced with the total number and the nature of additional current offenses and prior offenses. RCW 9.94.310 and RCW 9.94.320. The seriousness level is determined by the most serious offense, Assault I in this case. RCW 9.94A.400(3). Mr. Cook's Offender Score will total either 7 or 9 points as he is given 3 points for his second current assault offense, and 2 points each for each set of prior robbery convictions; including the 1958 robberies and the 1965 robberies would total 7, or if the 1976 federal robbery is counted, the total would be 9. RCW 9.94A.310 and RCW 9.94A.330. The "seriousness level" for Assault 1 is XI. On the grid for Level XI, a change in Offender Score from 5 to 7 raises the midpoint of the presumptive term from 9 years, 9 months to 13 years, 6 months (3¼ years); a change from 7 to 9 raises the midpoint of the presumptive term from 13 years, 6 months to 17 years, 6 months (4 years). RCW 9.94.310. Relevant excerpts of these statutes are attached as Appendix C to Respondent's Brief In Opposition.

Therefore, assuming that the Board follows State law, the Board will directly enhance Mr. Cook's mandatory or presumptive prison term because of the 1958 prison term. As the State puts it, "the length of [his] prison sentence actually served" will be "directly related" to Mr. Cook's prior criminal record. State's Brief at 8, n.8. Mr. Cook's only remedy to challenge the State's use for enhancement of his 1958 conviction is through petitions for post-conviction relief. The Board determines the existence of such convictions for enhancement purposes, but does not determine constitutional validity questions. *In re Bush*, *supra*, 627 P.2d at 955.

SUMMARY OF ARGUMENT

Habeas petitioner Mark E. Cook's petition meets the "in custody" jurisdictional requirement based on three facts: (1) he is "in custody" on his 1978 Washington sentence; (2) he specifically alleged that his 1958 Washington robbery conviction was unconstitutionally obtained and would enhance the 1978 prison term; and (3) the 1958 conviction will cause lengthened imprisonment on the 1978 sentence. This is a direct claim of unconstitutional imprisonment, the core concern of federal habeas corpus jurisdiction.

Confinement in prison certainly is "custody" under even the most restrictive definition. Moreover, this Court has for many years allowed the constitutional validity of prior convictions used to enhance later sentences to be challenged, even when the effect of the prior conviction on a new sentence was not capable of quantification. In this

case, the prior conviction will cause a direct enhancement of a substantial number of years on a prison term, and the alleged constitutional defect in the prior conviction is the fundamental and long-recognized right not to be tried while incompetent.

The Ninth Circuit quite properly invoked habeas corpus jurisdiction in these circumstances, as has virtually every other circuit court which has directly faced a similar question over the past twenty years. The effect of the 1958 conviction on the 1978 prison term is not a civil penalty collateral to the issue of unconstitutional incarceration; it is a direct enhancement of sentence under a criminal judgment which is more than sufficient to invoke the strong but limited federal interest to remedy unconstitutional incarceration. The three circuit cases the State cites do not provide significant support even for a serious claim of a split in the circuits on the issue presented, let alone strong authority for the State's claim that there is no "custody".

The State's concession of custody on the 1978 sentence and the 1958 conviction's lengthening effect on the new prison term leave at most a technical problem with the Ninth Circuit's decision in this case. The Ninth Circuit held there was "custody" on the 1958 conviction due to its enhancing effect on a current sentence. Other circuits have held that the "custody" in such cases is on the current "enhanced" sentence. There is no practical difference in these two approaches in the present case: Mr. Cook's petition challenged both the 1958 Washington conviction directly and the 1978 Washington sentence as it was enhanced by the 1958 conviction. No matter how it is labelled, Mr. Cook's challenge will be brought in the same court on the same proof. Given that it is in the nature of habeas corpus to cut through form to reach substance,

this Court should hold that Mr. Cook has adequately pled the case and remand for further proceedings.

The State exaggerates the effects that affirmance of the Ninth Circuit's decision would have. Federal courts have a limited role, coextensive with the Constitution, in reviewing state sentencing systems and the decisions those systems generate. Habeas corpus review of prior convictions used to enhance present sentences is a very limited, proper remedy tailored to enforce only legitimate federal interests. The states remain free to design any sentencing system they choose so long as minimum constitutional standards are followed.

The State's asserted concerns about finality and delay are insufficient to justify altering federal habeas review of allegedly unconstitutional prior convictions which actually lengthen imprisonment. Moreover, the State's decision to resurrect the 1958 conviction for enhancement of the 1978 sentence is the source of the lack of finality here, and Mr. Cook may be hampered in his ability to prove his claim precisely because the State's use of the 1958 conviction for enhancement comes so long after the conviction itself. Given the State's choice to employ the prior conviction, the State's legitimate interests are not seriously impacted. No reasonable justification is offered for the State's proposed radical change in well-accepted habeas corpus review of prior convictions which enhance current sentences.

ARGUMENT

I. BECAUSE MR. COOK'S 1958 WASHINGTON CONVICTION DIRECTLY ENHANCES HIS NEW WASHINGTON PRISON SENTENCE, THERE IS FEDERAL HABEAS CORPUS JURISDICTION TO REVIEW THE CONSTITUTIONAL VALIDITY OF THE 1958 CONVICTION.

A. The Actual Incarceration Imposed By The 1958 Conviction—In The Form Of An Enhanced Prison Term On The 1978 Sentence On Which Mr. Cook Is Indisputably In Custody—Is More Than Sufficient To Confer Federal Habeas Corpus Jurisdiction.

1. Restraints From Prior Convictions On Present Prison Terms Impose "Custody".

Federal habeas corpus jurisdiction over state court convictions is limited to petitions "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution . . . of the United States". 28 U.S.C. § 2254(a) (pertinent part). *See* also 20 U.S. § 2241(c): "The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ." (pertinent part). Respondent Mark Edwin Cook is in custody on his 1978 sentence imposed by a state court, and he has alleged that that custody violates the Constitution, as is shown below. Therefore, there is jurisdiction under § 2254.

Three critical facts demonstrate that the statutory criteria are met: (1) Mr. Cook's 1958 Washington conviction will directly affect the length of the prison term on his 1978 Washington sentence; (2) Mr. Cook is "in custody" on the 1978 sentence; and (3) Mr. Cook alleged in his habeas petition that the 1958 conviction was unconstitutionally obtained and would enhance the 1978 sentence. As to enhancement, the State specifically concedes that "under

current Washington law, the length of the prison sentence actually served by all felony offenders is *directly* related to those offenders' prior criminal records." State's Brief at 8, n.8 (emphasis added).[8] Regarding habeas corpus "custody" on the 1978 sentence, the State specifically conceded this point in the District Court. J.A. 33.[9] Regarding clear allegations, Mr. Cook specifically alleged both the unconstitutionality of the 1958 conviction and its enhancement of the 1978 sentence. J.A. 6-7.

These facts, in light of two lines or reasoning which have long been accepted by this Court, demonstrate habeas corpus jurisdiction to challenge the 1958 conviction.

The first relevant line of reasoning involves the meaning of the word "custody" in 28 U.S.C. §§ 2241 (c)(3) and 2254(a). This Court determines whether a habeas petitioner is "in custody" under these statutes by analyzing the severity of restraints imposed by the judgment under attack. *Jones* v. *Cunningham*, 371 U.S. 236, 240-243 (1963); *Hensley* v. *Municipal Court, 411 U.S. 345, 351 (1973); Lehman* v. *Lycoming County Children's Services*, 458 U.S. 502, 508-510 (1982); *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984). *See* specifically, 466 U.S. 300-301, and 338-340 (O'Connor, J. dissenting). Actual incarceration pursuant to a criminal judgment

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[8] The 1958 Conviction will enhance the prison term on the 1978 sentence in at least one of three ways. *See* Counterstatement Of The Case, above at pp. 4-9.

[9] Mr. Cook is currently serving a federal prison term, and the 1978 state conviction will be served consecutively. J.A. 8. The State has placed a detainer with the federal authorities to enforce the 1978 state sentence. J.A. 33. Under *Peyton* v. *Rowe*, 391 U.S. 54 (1968) and *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), this combination of circumstances constitutes present "custody" for federal habeas corpus purposes.

has, of course, always amounted to "custody". *Lehman*, *supra* at 508-510.

Indeed, it is the fact of "custody" under a state judgment which justifies federal habeas relitigation of state determinations of federal constitutional questions in the first place:

> "Custody" is the touchstone relied on by § 2254; of all the possible unconstitutional infringements on personal freedom, only unlawful "custody" has been identified as providing a sufficient basis for federal intervention.

Lydon, *supra*, 466 U.S. 340 (O'Connor, J. dissenting). *Accord*, *Lehman*, *supra*, 458 U.S. at 512-513. And, of all the possible forms of unconstitutional "custody" which could justify federal intervention, incarceration in prison provides the strongest justification. *Id.* at 508-510.

Mr. Cook's 1958 conviction is the direct and only cause of at least 3¾ years of presumptive prison time on the 1978 sentence. Counterstatement Of The Case above, at pp. 4-7. If the 1958 conviction did not exist, neither would those presumptive years in prison which have yet to be served. The 1958 conviction thus causes imprisonment, the greatest restraint the state can impose other than capital punishment. This restraint is obviously far greater than other restraints which this Court has held to constitute "custody" under §§ 2241 and 2254. *See*, e.g., *Jones* v. *Cunningham*, *supra* (parole); *Hensley* v. *Municipal Court*, *supra* (personal recognizance, at least where a stay was necessary to prevent immediate imprisonment). It is also surely severe enough to warrant federal intervention:

> . . . [T]he basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom.

Johnson v. *Avery*, 393 U.S. 483, 485 (1969). *Accord*, with historical references, *Harris* v. *Nelson*, 394 U.S. 286, 290-292 (1969); *Preiser* v. *Rodriguez*, 411 U.S. 475, 484-488 (1973).

The second relevant line of reasoning and authority prohibits the use of constitutionally infirm prior convictions to enhance sentence on a later conviction. *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967) (uncounseled convictions at state recidivist jury trial); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972) (general consideration at sentencing of uncounseled prior convictions). *See also Johnson* v. *Mississippi*, 486 U.S. ___, 100 L.Ed. 2d 575, 108 S.Ct. 1981 (1988) (state may not base death penalty aggravating circumstance on prior conviction later held unconstitutional); *United States* v. *Morgan*, 346 U.S. 502 (1954) (federal court could entertain *coram nobis* petition seeking to vacate federal conviction on which sentence had expired, but which was being used to enhance subsequent state sentence).

The use of constitutionally invalid prior convictions to enhance a current sentence causes a present violation of constitutional rights in two related ways: It denies due process by allowing sentencing based on "materially inaccurate" information (*Johnson* v. *Mississippi*, 100 L.Ed.2d at 587, 108 S.Ct. at 1989), i.e., "misinformation of constitutional magnitude," (*Tucker*, 404 U.S. at 447). *See also Townsend* v. *Burke*, 334 U.S. 736 (1948). It also forces the defendant to ' suffer[] anew from the deprivation . . ." of constitutional rights occurring at the first conviction. *Burgett*, *supra*, 389 U.S. at 115. *Accord*, *Tucker*, *supra*, 400 U.S. at 448 (the issue is whether the sentence in the current case "might have been different if the sentencing judge had known" of the constitutional infirmities).

It is a misnomer in light of these decisions to label Mr. Cook's 1958 conviction "expired" when it is used to enhance a present term. Such a conviction is not "expired," it is resurrected for active use by the state, and any constitutional infirmities are resurrected with it. The *sentence* on the conviction may have expired and therefore be unreachable in habeas proceedings. *See North Carolina* v. *Rice*, 404 U.S. 244 (1971); *Lane* v. *Williams*, 455 U.S. 624 (1982). But the fact that Mr. Cook's "liberty or freedom is not in any way curtailed by a [sentence] that has expired . . .", *Lane* at 631, does not mean that the conviction itself is not curtailing his liberty. It is, in the form of several more years in prison on the 1978 sentence. Mr. Cook's attack is on the conviction which haunts him, not the sentence which does not.

These two lines of accepted doctrine, separately and together, demonstrate the existence of habeas corpus "custody" in this case. A state conviction on which the original sentence has technically expired is subject to federal review precisely when, and precisely because, it is resurrected to cause present imprisonment:

> . . .[P]etitioners who have been released after serving sentences and suffer none of the legal restraints associated with parole are generally denied the benefit of the writ. The collateral consequences they suffer may be burdensome, even debilitating, but in the Court's eyes they do not justify extraordinary relief. *Only when it is claimed that prior convictions were used to convict the petitioner of a new offense or to enhance terms now being served does the balance tip back in favor of federal intervention. . .*

Yackle, *Post-Conviction Remedies* (1981) § 43, p. 187 (emphasis added; citations omitted). *Accord*, "Developments In The Law: Federal Habeas Corpus," 83 HARV. L. REV. 1038, 1081 (1970) (If a "prior" or "ancillary" conviction is "unlawful, to the extent that the petitioner's custodial status [on a newer conviction] is affected adversely thereby, he is unlawfully in custody") (footnotes omitted). Simply put, all allegedly unconstitutionally conditions which cause or lengthen a prison sentence are properly subject to habeas corpus review. *See, e.g., Ex parte Hull*, 312 U.S. 546 (1941) (permitting habeas attack on conviction because it was the basis for a parole revocation on another sentence); *Jago* v. *Van Curen*, 454 U.S. 14 (1981) (habeas challenge to parole procedures on due process grounds); *Preiser* v. *Rodriguez*, *supra*, 411 U.S. at 487 (challenge to prison system's good conduct credit procedure must be brought by habeas corpus).

Jones v. *Cunningham*, *supra*, is an example of the general acceptance of these principles. In *Jones*, the Court decided the issue whether the petitioner was in custody on his newest conviction while on parole. But the substantive claim he made was that an old conviction—on which sentence had apparently expired—enhanced the new sentence. 371 U.S. at 237. No question was raised regarding the propriety of this challenge, and for good reason. The federal interest rises precisely with the actual physical restraint imposed, and rises to virtually its highest level when that restraint equals an increase in actual incarceration.

Moreover, the need for federal intervention if Mr. Cook can prove his claim is even greater than it was in many of the prior cases in this Court. The question here is not whether a sentence *might* have been different if the constitutional infirmities are cured—as in *Townsend*, 334 U.S. at 741; and *Tucker*, 404 U.S. at 448. Rather, there is no doubt that if Mr. Cook proves his claim his prison term on the 1978 sentence *will* be directly affected, because that term is directly related to the number of prior convic-

tions by operation of mandatory provisions of state law. Given the long-recognized fundamental defect Mr. Cook claims in the 1958 conviction, the case for limited federal intervention to assure that his 1978 sentence is constitutional could not be stronger.[10]

The federal circuits follow these principles. Ten circuits have decided relevant reported cases. The seven which have made clear rulings on the question presented here all hold that if a prior conviction on which sentence has expired enhances or prolongs a current sentence, there is federal habeas jurisdiction. *Anderson* v. *Smith*, 751 F.2d 96, 98 (2nd Cir. 1984); *Lyons* v. *Brierly*, 435 F.2d 1214 (3rd Cir. 1970); *Tucker* v. *Peyton*, 357 F.2d 115 (4th Cir. 1966); *Young* v. *Lynaugh*, 821 F.2d 1133 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 503, 1040 (1988); *Harrison* v. *Indiana*, 597 F.2d 115, 116-117 (7th Cir. 1979); *Cook* v. *Mal-*

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[10] Mr. Cook claims incompetence to stand trial. As then Chief Justice Burger wrote for a unanimous Court:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became "mad" after the commission of an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought." Similarly, if he became "mad" after pleading, he should not be tried, "for how can he make his defense?" 4 W. Blackstone, Commentaries *24. *See Youtsey* v. *United States*, 97 F. 937, 940-946 (CA6 1899). Some have viewed the common-law prohibition "as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom is in reality afforded no opportunity to defend himself." Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Pa. L. Rev. 832, 834 (1960). *See Thomas* v. *Cunningham*, 313 F.2d 934, 938 (CA4 1963). For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice. See generally Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 455, 457-459 (1967). . .

Drope v. *Missouri*, 420 U.S. 162, 171-172 (1975)

eng, *supra* (present case); *Aziz* v. *Leferve*, 830 F.2d 184, 186 (11th Cir. 1987). The Eighth Circuit has strongly implied the existence of habeas jurisdiction in such a case, although only in the district court having jurisdiction over the enhanced sentence (*Noll* v. *Nebraska*, 537 F.2d 967 (8th Cir. 1976), and has for many years allowed § 2254 challenges to prior convictions that enhance current sentences without discussion of the jurisdictional issues (e.g., *Losieau* v. *Sigler*, 406 F.2d 795 (8th Cir. 1969)). *But see Cotton* v. *Mabry*, 674 F.2d 701, 703-704 (8th Cir. 1982), *cert. denied*, 459 U.S. 1015 (1982), discussed at pp. 22-23 below. The two remaining circuits have allowed challenges of this type without discussion of the "custody" issue. *Arnold* v. *Marshall*, 657 F.2d 83 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982) (by implication: jurisdiction was unquestioned; dismissal of petition affirmed on other grounds); *Smith* v. *Crouse*, 413 F.2d 979 (11th Cir. 1969) (affirming district court opinion, 298 F. Supp. 1029 (D. Kan. 1968), demonstrating apparent expiration of prior sentence).

The Ninth Circuit's narrow holding in the present case was fully consistent with all of these principles and decisions.

> We do not hold that jurisdiction afforded by § 2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the State uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be

justified. See *Hensley* v. *Municipal court*, 411 U.S. 345, 350-51, 93 S.Ct. 1571, 1574, 36 F.Ed.2d 294 (1973).

Cook v. *Maleng*, *supra*, 847 F.2d at 619. That holding was correct.

2. The State's Jurisdictional Arguments Fail To Show How Incarceration Is Not "Custody".

The State in its Brief simply ignores the massive foundation for the Ninth Circuit's holding which has been detailed above. Instead, the state offers only three circuit opinions, of which two are irrelevant and the third is neither clear nor persuasive authority, and an incorrect reading of one of this Court's cases.

The State's claim that the Fourth Circuit does not allow habeas challenges to so-called "expired" convictions which enhance current sentences incorrect. The Fourth Circuit has for many years permitted habeas petitioners to challenge "expired" convictions which lengthen current prison terms. E.g., *Tucker* v. *Peyton*, *supra*, 367 F.2d 116-119; *Strader* v. *Troy*, 571 F.2d 1263 (4th Cir. 1978). These cases remain the law of the Fourth Circuit.

The Fourth Circuit case the State cites, *Harris* v. *Ingram*, 683 F.2d 97 (4th Cir. 1982), does not deny habeas jurisdiction regarding old convictions that enhance current sentences. Rather, *Harris* holds that a habeas petitioner who was in federal custody elsewhere could not challenge a Virginia conviction on which sentence had expired directly in a habeas petition filed in U.S. District Court in Virginia because there was no continuing Virginia custody. The *Harris* opinion did not hold there was no jurisdiction to challenge the enhanced sentence, only that the challenge should be raised in the forum having

jurisdiction over the federal sentence which was allegedly enhanced by the old Virginia conviction:

> While it may even be true, as Harris argues, that his Virginia conviction enhanced the federal sentence that he is currently serving and that the conviction affects his eligibility for parole, this, however, is a challenge to federal custody, which may only be made, if at all, in an appropriate proceeding such as one under 28 USC § 2255. See *United States* v. *Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Nelson* v. *George*, 399 U.S 224, 228 n.5, 90 S.Ct. 1963, 1966 n.5, 26 L.E.2d 578 (1970); *Strader* v. *Troy*, 571 F.2d 1263 (4th Cir. 1978).

683 F.2d at 98-99 (footnote omitted here, which makes it clear that the court is not addressing the merits of a petition "filed in the appropriate court"). *Harris* thus holds not that habeas relief is precluded, just that the petition was filed in the wrong court.

This is made certain by the *Harris* court's citation to *Strader* v. *Troy*, *supra*. In *Strader*, the Fourth Circuit transferred a habeas petition from federal district court in Virginia to federal district court in North Carolina because it was a North Carolina sentence with was allegedly enhanced by an "expired" Virginia conviction. Again, the question was not whether the old enhancing conviction could be challenged, but where.

Mr. Cook's case presents no such inter-jurisdictional problems: Both the enhancing and the enhanced convictions are Washington State convictions. Given the lack of a venue issue, the Fourth Circuit would allow Mr. Cook's challenge to the 1958 Washington conviction because it enhances his current sentence from the same state.

The Sixth Circuit case cited by the State does not support its position either. *Ward* v. *Knoblock*, 738 F.2d

134 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), just like *Harris* v. *Ingram*, involves the question of *where* a challenge to a new sentence enhanced by an old conviction must be brought, not *whether* the enhancing conviction can be challenged. *Ward*, like *Harris*, involved inter-jurisdictional venue questions, and held only that where the only present custody was federal, an old Michigan conviction allegedly affecting federal custody could not be challenged in a habeas action against the State of Michigan, but must proceed under 28 U.S.C. § 2255: "Petitioner's arguments regarding the conditions of his present custody arising from his past wrongs should be decided by a court having subject matter jurisdiction over his present custody". 738 F.2d at 138.

The Eighth Circuit, the last relied upon by the State, also fails to provide persuasive authority for the State's position. The Eighth Circuit has allowed habeas petitions challenging "expired" convictions which enhance new terms. *Losieau* v. *Sigler*, 406 F.2d 795 (1969). Moreover, the Eighth Circuit has strongly implied, in an inter-jurisdictional case just like *Harris* v. *Ingram* and *Ward* v. *Knoblock*, that there would be habeas jurisdiction in the district where the new sentence enhanced by the prior, "expired" conviction was imposed. *Noll* v. *Nebraska*, 437 F.2d 967 (1976). The State's proposed authority, *Cotton* v. *Mabry, supra*, may suggest otherwise, but not clearly so: The *Cotton* opinion says that an "influence which the [prior] five year sentence *may have had* on the subsequent sentences is a collateral consequence and does not give this court jurisdiction to grant habeas relief". 674 F.2d at 703 (emphasis added). The *Cotton* court does not refer to the other Eighth Circuit cases allowing habeas challenges where a direct enhancement is alleged, and so the court apparently found that the alleged "influence" of the old

conviction was not direct or specific enough to allow a challenge. Moreover, even if the *Cotton* court did intend to preclude habeas challenges to older enhancing convictions, it stands without significant support, even in the Eighth Circuit, and lacks a serious or correct analysis of the issue.[11]

The State's claim of a split in the circuits on the issue presented is thus greatly exaggerated. One ambiguous Circuit holding based on highly questionable reasoning does not equal a serious split of authority. The Ninth Circuit decision in this case did nothing to expand habeas jurisdiction, it merely followed the correct reasoning in virtually all prior circuit opinions. This Court should reject the State's attempts to impose a radical change in this well-accepted and well-reasoned circuit practice.

The State also tries to claim that the present consequences of the 1958 conviction are merely "collateral" as that term is used in *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), and therefore are not sufficient to confer custody. However, the State's argument is fatally flawed in two

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[11] The *Cotton* result is based only on *Harvey* v. *South Dakota*, 526 F.2d 840 (8th Cir. 1976), *cert. denied*, 426 U.S. 911 (1976), a case in which an expired conviction was attacked when there was *no* present or future custody of any type pending. Not surprisingly, *Harvey* held there was no "custody". The *Cotton* opinion totally fails, however, to discuss any of the authority holding that direct enhancements from old sentences do constitute "custody". *See also Grice* v. *Mattox*, 797 F.2d 686 (8th Cir. 1986). *Grice* was decided on the interjurisdictional ground that the petitioner was only in Texas custody and therefore could not file a federal habeas petition in Missouri challenging an old Missouri conviction which enhanced his Texas sentence. *Cotton* was cited for the proposition there was no Missouri custody, but the *Grice* court also pointedly noted that "[t]here is much precedent" against the "custody" holding of *Cotton*. *Id.* at 687, n.2

respects. First, the consequences of the 1958 conviction are not merely "collateral" within the meaning of *Carafas*. In *Carafas*, the kinds of collateral consequences found sufficient to defeat a mootness claim included only civil consequences, i.e., disqualification from voting, engaging in certain businesses, serving as a union official or juror. 391 U.S. at 237. But Carafas suffered no extra present incarceration as a direct result of the conviction at issue there. By contrast, Mr. Cook's 1958 conviction in the present case is the sole cause of additional imprisonment under a criminal judgment, thus invoking the heart of the type of physical "custody" which does justify federal habeas intervention.

Second, it is beside the point to claim, as does the State, that Mr. Cook is in prison now because of his new criminal behavior, rather than the 1958 conviction. It is true that Mr. Cook *has* a prison sentence because of that new conviction, but the *length* of the sentence could not be what it is without the 1958 conviction. Therefore, the 1958 conviction—the cause of the allegedly unconstitutional length of sentence—can be questioned in habeas proceedings as well. *See* pp. 12-18, of this Brief, above.

The State's "light off" argument (State's Brief at 16) also ignores the crucial reality that the 1958 conviction causes extra incarceration. The State causes habeas jurisdiction whenever it imposes new incarceration. *See*, e.g., *Tinder* v. *Paula*, 725 F.2d 801, 805 (1st Cir. 1984) (mere continuing liability for restitution after expiration of probation is not "custody," but if under state law "probation is extended or revoked," custody would be rekindled). In such cases, as in the present case, the State controls whether there will be extra incarceration, and therefore whether habeas corpus "custody" will exist. "Custody"

exists as long as, and every time that, the convicted person is in prison.

The logical and fundamentally fair "bright line" to draw is at the point of incarceration. This Court should reject the State's suggestion that no matter how directly and severely an old conviction enhances a new sentence, there can be no "custody" after the original sentence has expired. The standard "severity of restraint" analysis, which leads directly to a holding of "custody" in this case, should be retained.

B. The State's Jurisdictional Claim Amounts To A Technical, Purely Formal Complaint That Mr. Cook Should Have Presented His Challenge To The 1958 Conviction Only Under The Rubric Of A Challenge To The 1978 Sentence.

The State does not directly claim, nor could it claim, that Mr. Cook cannot challenge in habeas corpus proceedings the constitutional validity of his 1978 Washington sentence. The State has conceded that Mr. Cook is in "custody" on the 1978 sentence. An allegedly unconstitutional prior conviction used to lengthen such a sentence undoubtedly can be collaterally questioned in habeas corpus proceedings. *See* Argument § I.A. of this Brief, immediately above. This is the allegation of Ground Two of Mr. Cook's petition. J.A. 6. Therefore, the "dismissal" the State hopes to gain in this case could, at most, be a dismissal without prejudice to cure a formal pleading defect.

There is a technical debate among the circuits concerning one question: Must a habeas challenge to a prior conviction on which sentence has expired but which is used to enhance a present term be brought in the context of a petition challenging the present sentence, or can the

challenge be brought directly to the old conviction? *See* discussion in *Noll* v. *Nebraska*, *supra*, 537 F.2d at 968-969. *See also* Yackle, *Post-Conviction Remedies*, *supra* (with 1988 Supplement), § 43, p. 187 n. 72 and accompanying text (discussing the debate on this venue issue). These cases have arisen when there are problems of old convictions from one state enhancing new sentences in another state, a situation not presented in the present case. E.g., *Strader* v. *Troy*, *supra*, 571 F.2d at 1265-1266.

This technical debate, at least in the context of the present case, is an argument on mere form, and has no substantive importance. Mr. Cook listed the 1958 conviction as the subject of his petition (J.A. 3), but he has pled his case in the alternative: Ground One challenges the 1958 conviction directly; Ground Two challenges the 1978 sentence as it is enhanced by the 1958 conviction. There is no venue problem: all convictions occurred in the Western District of Washington, and no matter how the habeas petition grounds are labeled, the petition must be filed there. Moreover, whether the challenge to the 1958 conviction is made directly or in the context of the 1978 sentence, only Washington records and witnesses will be involved, and the issues, proof and proceedings will be exactly the same.

At most, then, Mr. Cook's *pro se* habeas petition contains a mere technical defect because it lists the 1958 conviction as the "conviction under attack" and in Ground One it mounts a direct challenge to the 1958 conviction.[12] Habeas corpus, however, is not a formalistic remedy, "but

[12] Another possible technical defect is in Ground Three, regarding the effect of the 1958 Washington conviction on Mr. Cook's federal sentence. Mr. Cook may have to bring such a challenge in the sentencing court under 28 U.S.C. § 2255. *See* e.g., *Harris* v. *Ingram*, *supra*, 683 F.2d at 98-99.

one which must retain the 'ability to cut through barriers of form and procedural mazes'", *Hensley* v. *Municipal Court*, *supra*, 411 U.S. at 350, quoting *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969). The Fifth Circuit has properly rejected an argument just like the State's technical claim here, and held that as long as there is a "positive and demonstrable" relationship between the old conviction and the new sentence, "The greensward of § 2254(a) . . . reveals no such hypertechnical pitfall". *Young* v. *Lynaugh*, *supra*, 821 F.2d at 1137. Given that there is no practical difference between Mr. Cook's challenges in Ground One and Ground Two, and that Ground Two is sufficient by itself to invoke habeas jurisdiction, this Court should simply affirm the Ninth Circuit's holding and direct that the case proceed under Ground Two.

Alternatively, even if this Court were to determine that the formal distinction is of significance, Mr. Cook's case obviously should not be dismissed without any remedy made available to him. Rather, this Court should construe Mr. Cook's *pro se* pleading liberally and hold that he can simply amend his pleadings in the district court and proceed under the rubric of the 1978 conviction. *See Haines* v. *Kerner*, 404 U.S. 519 (1972). Finally, even if the Court feels dismissal is necessary, such dismissal should be without prejudice to submit an amended pleading labeling the petition as only a challenge to the 1978 sentence.[13]

[13] The State may also be obliquely raising another highly technical claim, i.e., that Mr. Cook should wait for his 1978 state sentence to commence to see exactly how the 1958 conviction affects his prison term when Washington authorities set it; this may explain the State's use of the words "may have been used to enhance" in its Statement of the Question Presented. However, waiting would be unnecessary and nonsensical. Under state law, the Indeterminate Sentence Review Board must directly consider and apply the 1958 conviction to deter-

C. Given That The State Has Chosen To Resurrect The 1958 Conviction For The Sole Purpose Of Giving Mr. Cook More Time In Prison On The 1978 Conviction, The Limited Federal Interest In The Fundamental Constitutional Reliability Of The Enhancing Conviction Does Not Impede The Legitimate Ends Of The State's Sentencing System.

The State claims that the Ninth Circuit decision in this case would expand habeas jurisdiction and "further erode" the concept of finality and that it "interfere[s] with the operation of state criminal justice systems". State's Brief at 7 (heading to Argument 3). These claims are unfounded. The Ninth Circuit decision does not expand habeas jurisdiction, as is shown above. Moreover, as is shown here, the Ninth Circuit's decision—which represents a continuation of limited federal habeas review of unconstitutional prior convictions used to add incarceration on present sentences—invades no legitimate state province.

1. The Federal Interest Is Limited And Does No Harm To Legitimate State Interests.

Federal habeas review of unconstitutional prior convictions used directly to give prisoners more time in prison

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mine the prison term. *See* Counterstatement Of The Case at pp. 4-9, above. Therefore, it is positively known that the 1958 conviction will have a direct effect on that term. Given this, there is no reason to wait: As this Court emphasized in *Peyton* v. *Rowe*, *supra*, such delays until future sentences commence are detrimental to the fact-finding process in habeas proceedings. 391 U.S. at 62-64. If Mr. Cook is required to wait longer this will only add to the problems both Mr. Cook and the State already are experiencing in marshalling evidence. Moreover, the Washington Supreme Court has already heard Mr. Cook's collateral challenge to the 1958 conviction. J.A. 12-14. Waiting, if it is being advocated, should be strongly rejected.

strikes an appropriate balance between the limited federal interest in the constitutional reliability of prison sentences and the broad state interest in fashioning a sentencing system in any way that does not contravene the Constitution. The State is free to establish a sentencing system relying heavily on prior convictions, but the federal courts do have a legitimate, limited federal interest—indeed a duty—to inquire into incarceration which allegedly violates the Constitution. 28 U.S.C. § 2254. This duty is coextensive with the "custody" limitation on federal habeas jurisdiction, and it goes no further than inquiry into whether prior convictions used to add prison time meet minimum constitutional standards: When counsel has been provided, guilty pleas have been voluntary. convicted persons have been competent to stand trial, confessions have not be coerced, etc., the State is free to employ prior convictions for any rational purpose without fear of federal intervention. Once such minimum standards are met, the federal interest and duty ends, and the State retains plenary control of its criminal sentencing system. *Compare Spencer* v. *Texas*, 385 U.S. 554 (1967) (state may use prior convictions to enhance sentence) *with Burgett* v. *Texas*, 389 U.S. 109 (1967) (prior convictions used in this system must not be constitutionally infirm).

Washington and the other jurisdictions adopting sentencing systems relying directly upon prior convictions certainly knew, based on many decisions of this Court and the circuits, that the constitutional validity of some of those convictions might be questioned. *See*, e.g., United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1988 Revised Edition), p. 207 ("Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history

score"). The Washington courts accept this principle but have chosen a different remedial avenue: Washington holds that the constitutionality of prior convictions should be determined on collateral review with the burden of proof on the petitioner. *In re Bush*, *supra*, 627 P.2d at 955-956 (validity of prior convictions used to enhance under former RCW 9.41.025 and RCW 9.95.040 can be determined on collateral attack); *State* v. *Ammons*, 105 Wn.2d 175, 713 P.2d 719, 727 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 398 (1987) (collateral attack is proper avenue of relief under the new Sentencing Reform Act for all but facially invalid convictions). Therefore, the Washington courts have chosen to refer defendants to their collateral remedies, and the Washington courts recognize and accept the consequences:

> A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, *supra*, 713 P.2d at 727. *See also Toliver* v. *Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1988) (recognizing the primacy of habeas corpus relief for prisoners unlawfully incarcerated).

These decisions do not show a state court system chafing under an unbearable burden of collateral attacks. Rather, the Washington courts have repeatedly chosen the principle of later constitutional intervention in sentences already set in those few cases where petitioners can meet their burdens of proof on collateral attack. Indeed, in the present case, the Washington Supreme Court had no difficulty finding sufficient "restraint" on Mr. Cook's 1958 conviction to support a collateral attack. J.A. 12-14. Given the burden of proof on petitioners, and increased state court sensitivity to Constitutional rights over the past 25 years, the number of prisoners likely to gain resentencing after collateral attack is small and probably diminishing over time. The State in its Brief thus greatly exaggerates when it claims that continuing the present system of limited habeas review of prior convictions will wreak some unspecified damage on legitimate concerns of comity and federalism.

The State also makes the surprising suggestions that if this Court holds that there is jurisdiction over habeas petitions such as Mr. Cook's then there will be no requirement that prisoners pursue any state remedy, and the State will somehow bear the burden to disprove such claims. State's Brief at 10. These assertions are incorrect under settled habeas corpus law.

The exhaustion doctrine is in effect for all federal habeas petitioners, and requires that the substance of a federal habeas petitioner's claim be presented to the highest court of the state before it is included in a federal habeas petition. *Anderson* v. *Harless*, 459 U.S. 4 (1982); *Picard* v. *Connor*, 404 U.S. 270 (1971). Mr. Cook has pursued his available state remedies (J.A. 12-14), and all other petitioners will be required to do the same.

Moreover, it is settled that federal habeas petitioners have the burden of proving a *prima facie* case on their claims. *See* e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, 468-469 (1938). The State's suggestion that it will bear a previously unrecognized burden of proof on Mr. Cook's claim is thus unfounded.[14]

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[14] Notably, however, when the state did have the burden of proof, in the 1977 habitual criminal proceedings, it could not meet that burden, not because of any delay on Mr. Cook's part, but because

> . . . an investigation of the King County Prosecuting Attorney shows that no order of competency was filed, no transcript of a competency hearing exists and the entries of the clerk of the court do not show that a hearing to determine competency was made . . . or that a finding of competency was made.

J.A. 10. This suggests not that the records have been lost, but that the original record does not support the conviction.

2. Concerns Of Delay And Finality Are Not Heavily Implicated On The Jurisdictional Question Raised Here.

The State also attempts to raise related concerns regarding delay and lack of finality of judgments. State's Brief at 7-12. These assertions are not persuasive. Finality concerns, to whatever extent they may be relevant to determining the outer fringes of habeas corpus "custody", could never be sufficient to make imprisonment not equal "custody."[15] Moreover, issues of delay have nothing to do with the jurisdictional question raised here; delay issues are fully addressed by other aspects of habeas doctrine and rules which the state can invoke on remand.[16]

However, even if such assertions were strongly relevant to the "custody" question raised in this case, it is the State's choice to use the 1958 conviction to enhance the 1978 sentence that causes any problem. Mr. Cook's claim may suffer greatly due to the State's revival of the 1958 conviction to enhance the 1978 sentence. When the State uses very old convictions to lengthen new sentences, the State chooses to resurrect old constitutional defects as well. As long as the state chooses not to let the old 1958 conviction be truly final, chooses to renew it to lengthen current sentences, Mr. Cook has a legitimate present interest in the constitutional validity of that conviction. The State could refuse to enhance with older convictions;

[15] *See Lehman* v. *Lycoming County Children's Services*, *supra*, 458 U.S. at 508-514 (imprisonment under a criminal judgment is always custody; finality concerns are relevant to the fringe question whether habeas corpus "custody" exists in child custody matters).

[16] Delay is addressed in Rule 9(a) of the Rules Governing § 2254 Petitions in the United States District Courts. *See* Argument § II, below.

since it has instead chosen to use them, it must bear the consequences demanded by the Constitution.

The State's decision to use the 1958 conviction to enhance a 1978 sentence also makes it difficult for Mr. Cook to meet his burden of proving constitutional violations. This Court has cited "prejudice to meritorious claims" from lengthy delays in habeas cases where fact determinations may be crucial, including as in the present case "lack of competency to stand trial". *Peyton* v.*Rowe*, *supra*, 391 U.S. at 62. Mr. Cook is faced with proving the invalidity of a 1958 conviction which has new effects which were not triggered until 1977. He has objected since that time, but the passage of so much time harms him most because he bears the burden of proof.

The State's further asserted interest in "retrial" so that Mr. Cook can be punished if the 1958 conviction is overturned is slight, if it exists at all. *See* State's Brief at 10. If Mr. Cook proves his claim, he would not escape punishment on the 1958 conviction or on the 1978 conviction. He has served his term on the 1958 conviction and his 1978 prison term would simply be shortened by the amount of the unconstitutional enhancement from the 1958 conviction.

In examining the State's asserted interests, it is useful to examine as well the arbitrary and irrational results which the State's proposed rule would cause. For example, the sentencing court in 1958 could have sentenced Mr. Cook to 30 years instead of 20 years, as it was authorized in its discretion to do.[17] In that event, under the State's

[17] When Mr. Cook was sentenced for robbery in 1958, the trial court had discretion to sentence him to any maximum term up to life. *See Cranor* v. *Cooper*, 203 F.2d 833, 836 (9th Cir. 1953), *cert. denied*, 346 U.S. 839 (1953).

proposed rule, Mr. Cook could now challenge the 1958 conviction because the maximum 30-year term would not have expired before the habeas petition was filed. But, because the old term was actually 20 years, he could not. This proposed result is wholly arbitrary: It would preclude a challenge simple because of the length of the old term, even though that is the most irrelevant fact about the 1958 conviction as it relates to the 1978 sentence. It would permit the unlimited enhancement of a new sentence with prior, completely uncounseled convictions on which sentence had expired without a remedy, but allow challenges to identical convictions on which sentence has not expired. This would place convictions with identical enhancing effects on one side of the jurisdictional line or another based on factors extraneous to the issue of enhancement, and extraneous as well as to issues such as the constitutional or factual reliability of the old convictions.

Moreover, the State's proposed rule ignores reality and would lead to the filing of many unnecessary habeas petitions. At the time of an original conviction, the trial judge may have sentenced a prisoner to only a few months in jail or even outright probation for a year. In that case, there would be little need, and probably not enough time after exhaustion of state remedies, to pursue federal habeas corpus relief. However, when the State later uses the same old conviction to add years to a new prison term, the prisoner has a legitimate reason to litigate federal constitutional issues regarding the old conviction. The State proposes to penalize a petitioner for failing to initiate federal litigation when apparently little was at stake. The result would be not only unfairness but also many unnecessary federal habeas petitions, filed *pro se* and by counsel as preemptive measures in case the State decided later

to use an old conviction to enhance a subsequent prison term. To avoid such results, this Court should continue to allow habeas challenges to old convictions when there is a need for federal intervention, i.e., when those old convictions are causing current additional prison time.

The State proposes an irrational system which is a complete break with accepted habeas corpus doctrine granting jurisdiction when a prisoner alleges unconstitutional, actual imprisonment. The State's radical proposals for revamping habeas jurisdiction regarding unconstitutional sentence enhancements should be rejected.

II. THE STATE'S DELAY/LACHES ARGUMENT IS NOT RELEVANT TO THE JURISDICTIONAL QUESTION PRESENTED, HAS NOT BEEN DECIDED BY THE COURTS BELOW, AND IS MADE ON AN UNDEVELOPED AND INADEQUATE RECORD.

The State tries to argue, although it did not raise, an alleged "delay" issue. State's Brief at i, 10-12. This is in effect a claim of prejudice in responding to a habeas petition. *See* Rule 9(a) of the Rules Governing § 2254 Proceedings In The United States District Courts. This separate issue, which has no bearing on the "custody" question, should not be reached by this Court for the following reasons.

The "delay" issue has not been developed either factually or legally. The State raised the issue in the District Court (J.A. 15-22), but that court did not hear the facts or decide this issue because it ruled there was no "custody" and therefore no jurisdiction to consider any other issue. (Appendices B and C to the Cert. Petition). Consequently, Mr. Cook's appeal was solely on the "custody" question, so naturally the Ninth Circuit did not review the Rule 9(a) issue, either.

The District Court's understandable failure to reach the "laches" issue leaves the record seriously undeveloped and thus not ripe for decision here. For example, the State has suggested that delay in the filing of the habeas petition led to the lack of court records showing a competency hearing. J.A. 18-19. However, Mr. Cook has pointed to the prosecutor's admission in the 1977 habitual criminal proceedings (quoted above at p. 1) that there is a record but not a record of a competency hearing. J.A. 29-32. Those records which are referenced in that prosecutor's statement, including especially court clerk's notes, may still be available and should be examined by any court deciding this issue. However, these records are not in the record in this case and can be offered only upon remand. This Court should respond as it did regarding a different issue in *Hensley* v. *Municipal Court*, *supra:*

> The record on this point is more than a little obscure, and we express no opinion on the question beyond noting that the issue was not considered, much less resolved, by either of the courts below, and it is not in any sense presented for our decision.

411 U.S. at 347, n.3.[18] This Court should remand for lower

[18] Resolution of the delay issue in this case cannot adequately be made at this juncture, but it must be said that the existing record favors Mr. Cook on the Rule 9(a) issue. Mr. Cook could not reasonably have been expected to challenge the virtually dormant 1958 conviction until the State initiated habitual criminal proceedings after his conviction in 1976. As soon as the State did so, Mr. Cook did challenge the 1958 conviction, and the State soon admitted that the conviction could not be used to impose an enhanced sentence because the record did not indicate that the court's reasonable doubt about competency was ever resolved. Counterstatement of The Case, above, at p. 1. In these circumstances, the only "delay" which can fairly be attributed to Mr. Cook is the delay between his 1978 sentencing and the filing of his state post-conviction petition in the early 1980's, after the 1958 conviction was revived for enhancement. This is especially true here because of the alleged incompetence in 1958 which is supported by specific allegations of "history of confinement in mental institutions". J.A. 6. Moreover, such a delay would have to be the cause of prejudice to the state in responding to the petition. *See Strahan* v. *Blackburn*, 750 F.2d 438 (5th Cir. 1985), *cert. denied*, 471 U.S. 1138 (1985), and cases cited therein (loss of records cannot be part of the Rule 9(a) calculus when petitioner's alleged delay did not lead to loss). But this will be hard to show, because the real cause of the State's alleged proof problems may well be the failure of the original trial court record to show competency to stand trial, a failure which apparently preceded any delay attributable to Mr. Cook and may have been a defect from the beginning. Without at least an understanding of the true situation regarding the state court record and whether anything once in that record is, in fact, now gone—an understanding which is impossible to obtain on the current record before this Court—the State cannot be held to have met its burden to prove unreasonable delay by Mr. Cook causing prejudice to the State's ability to respond.

court determination of this issue, should the State choose to pursue it.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed and the case remanded for further proceedings on Mr. Cook's habeas corpus petition.

Respectfully submitted,

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